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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 767/2016*, **

Communication submitted by:	U.A. (represented by counsel, Rajwinder S. Bhambi)
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	16 August 2016 (initial submission)
Date of present decision:	17 May 2018
Subject matter:	Deportation of the complainant from Canada to Pakistan
Procedural issues:	Non-substantiation of claims; non-exhaustion of domestic remedies; incompatibility with the Convention
Substantive issue:	Risk of torture in the event of deportation to country of origin (non-refoulement)
Articles of the Convention:	3 and 22

1.1 The complainant is U.A., a national of Pakistan born in 1987. He claims that his forcible removal to Pakistan would constitute a violation by Canada of article 3 of the Convention. The complainant is represented by counsel.

1.2 On 17 August 2016, pursuant to rule 114, paragraph 1, of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to deport the complainant to Pakistan while the communication was being considered by the Committee.

1.3 On the same date, the Committee informed the complainant that the request for interim measures would be automatically lifted unless he further substantiated the risk he faced upon his return to Pakistan, notably by providing proof of blasphemy charges against him, by 17 October 2016.

* Adopted by the Committee at its sixty-third session (23 April–18 May 2018).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.

The facts as presented by the complainant

2.1 The complainant, a Shia Muslim, was involved in a relationship with a girl from the Sunni faith named N. His marriage proposal was rejected by her family as he was from a lower Shia caste. The couple were warned to stop seeing each other, otherwise they would face fatal consequences. They were caught together on 24 April 2010. The complainant was badly beaten by friends of the girl's family who are also members of the Taliban. The complainant alleges that although the Taliban is a banned terrorist group in Pakistan, a closely connected group, Lashkar-e-Taiba, operates with impunity and has vowed to kill him and his family. After the attack, the complainant fled the area. Also, in 2010, members of Lashkar-e-Taiba killed his cousin.

2.2 Since the complainant's departure, his family have been continually threatened and attacked by the group. They have tried to report these attacks to the police, but the police took no action. The complainant considers that this lack of action reflects police support for Sunni attacks against the Shia minority, and submits that he would not be protected by the authorities if returned to Pakistan. Since he left, his family have been forced to hide from the police and the terrorists, who are continually searching for him and his family. He provides three sworn affidavits from his parents, a friend and a neighbour confirming this.

2.3 The complainant states that, as a Shia, he has been declared a *Qafir* (infidel) by the Sunnis and could therefore face a death sentence or life imprisonment under the blasphemy laws of Pakistan. He provides support for the claim by quoting the Qu'ran in relation to statements about the killing of *Qafir* and also quotes Sunni clerics who have issued a fatwa against *Qafir*.

2.4 On 10 May 2010, the complainant moved to Lahore to escape the threat. In July 2010, he fled to the Islamic Republic of Iran for safety. On 27 December 2010, he received a study visa for the United Kingdom of Great Britain and Northern Ireland but did not seek refugee status as he was warned that if he did he would lose his student visa and that the United Kingdom was "not very good" with refugees from Pakistan. He arrived in Canada on 24 February 2013 and applied for refugee status immediately at the airport.

2.5 On 9 July 2016, the police raided the complainant's home in Pakistan and told neighbours that the complainant and his family should be produced before the police at the police station in relation to blasphemy charges. The complainant claims that police also attached a notice to his home declaring him and his family "wanted". He asserts that he is therefore also at risk of torture by the authorities in response to the allegation of blasphemy, and provides various sources that confirm that it is commonplace for individuals' rights to freedom of speech and of religion to be violated in Pakistan by charging them with blasphemy. He particularly refers to a report by the United States Department of State pointing out that "the Government's limited capacity and will to investigate or prosecute the perpetrators of attacks against religious minorities allowed a climate of impunity to persist … There were continued reports of law enforcement personnel abusing members of religious minorities and persons accused of blasphemy while in custody."[1] The report states that, as of the time of its writing, at least 17 people were awaiting execution for blasphemy, and at least 20 others were serving life sentences. The complainant further states that his status as a failed asylum seeker places him at risk of torture and arbitrary detention. He cites, among others, a report of the Immigration and Refugee Board of Canada that notes that failed asylum seekers that had been detained on immigration charges have been arrested on arrival in Pakistan by immigration officials.

2.6 On 15 October 2013, the Refugee Protection Division of the Immigration and Refugee Board of Canada denied the complainant's application for refugee status. On 20 March 2014, the Refugee Appeal Division declined his appeal against the decision. On 24 July 2014, the Division refused his application to reopen the appeal. On 12 November 2014, the Federal Court denied him leave to apply for judicial review. On 29 December 2015, his application for pre-removal risk assessment was rejected. The complainant's application for protection on humanitarian and compassionate grounds is still pending, but does not have

[1] International Religious Freedom Report for 2013. Available from www.state.gov/j/drl/rls/irf/2013religiousfreedom/index.htm#wrapper.

suspensive effect. On 22 July 2016, the Canada Border Services Agency informed the complainant by telephone that he should voluntarily leave Canada by 19 August 2016. On 10 August 2016, the Agency declined his application to defer his removal and he was therefore due to be forcibly removed from Canada on 19 August 2016.

2.7 The complainant requested that interim measures be indicated to the State party to prevent his removal to Pakistan while his communication was being considered.

The complaint

3.1 The complainant alleges that his deportation to Pakistan would put him at risk of torture or death at the hands of Lashkar-e-Taiba and the family of his girlfriend, in violation of article 3 of the Convention. He also claims that he cannot count on any protection from the authorities of Pakistan and that he is also at risk of torture and arbitrary detention in relation to blasphemy charges owing to his status as a failed refugee.

3.2 The complainant asserts that the aforementioned risk will be present in every part of Pakistan and that no flight alternatives are therefore available in his case.

State party's observations on admissibility and the merits

4.1 On 17 February 2017, the State party provided observations on admissibility and the merits of the complaint. The State party submits that the complainant has failed to exhaust all available domestic remedies that might allow him to remain in Canada. In particular, he failed to apply to the Federal Court for leave to seek judicial review of the negative decisions of 29 December 2015, on his application for a pre-removal risk assessment, and of 10 August 2016, on his request to the Canada Border Services Agency for an administrative deferral of his removal. His application for permanent residence based on humanitarian and compassionate considerations is still pending. These are effective domestic remedies to be exhausted prior to submitting a communication. The complainant has also been eligible to apply for a second pre-removal risk assessment since 29 December 2016.

4.2 The State party submits that the communication falls outside the scope of article 3 of the Convention, since the complainant fears persecution by non-State actors, that is, his former girlfriend's family and members of Lashkar-e-Taiba, a non-State entity banned by the Government of Pakistan. There is no evidence that public officials were in any way involved with or acquiesced to the complainant's alleged assaults by members of Lashkar-e-Taiba in 2010.

4.3 The complainant has failed to substantiate, even on a prima facie basis, that he faces a real, foreseeable and personal risk of torture in Pakistan, even if the human rights situation in the country could be described as problematic. There is no evidence that he has been or will be subject to torture at the hands of public officials or anyone acting in an official capacity, or that the State of Pakistan has or would consent to or acquiesce in such mistreatment. The complainant's allegations that he and his family are wanted on blasphemy charges or that he was declared a *Qafir* are unsubstantiated. He has provided no evidence, before either the domestic authorities or the Committee, that there are criminal charges pending against him, or that he is being investigated by the police. Regarding being declared a *Qafir*, he does not specify by whom and when such a declaration was made and does not provide any document in this connection.

4.4 The State party submits that the complainant's risk has been thoroughly assessed by the domestic authorities. On 4 June 2013, the Refugee Protection Division heard the case of the complainant, who claimed protection under sections 96 and 97 of the Immigration and Refugee Protection Act, alleging a fear of persecution based on his religion. On 15 October 2013, the Refugee Protection Division denied the complainant's claim for protection, finding that he did not face a personal risk of persecution, cruel and unusual treatment or punishment or a risk to his life. The Division rejected the complainant's application on the ground that he was not a credible witness for lack of probative evidence to substantiate his allegations. On 20 March 2014, the Refugee Appeal Division rejected the complainant's appeal on the ground that he had failed to comply with the established time limits and to provide further documentation. On 12 November 2014, the Federal Court denied him leave

to appeal that decision as, in order to be granted leave, the complainant should have demonstrated that there was a "fairly arguable case" or a "serious question to be determined".

4.5 The complainant's application for a pre-removal risk assessment was also rejected, on 29 December 2015, after due consideration of the complainant's submission and country reports on Pakistan. The pre-removal risk assessment officer determined that the complainant had presented little evidence to show that he faced a risk of persecution or a personalized, forward-looking risk of torture, risk to his life or a risk of cruel and unusual treatment or punishment at the hands of his former girlfriend's family or due to his religion. For the same reasons, the officer found it unnecessary to examine the existence of State protection or an internal flight alternative. The complainant did not seek judicial review of the pre-removal risk assessment decision before the Federal Court.

4.6 The complainant's application to defer his removal was denied by the Canada Border Services Agency on 10 August 2016, after considering his request and evaluating the totality of the materials submitted. The State party explains that claimants who allege new, personalized evidence of risk may request an administrative deferral of removal from a Canada Border Services Agency removals officer. With reference to the practice of the Federal Court of Appeal, the State party stresses that the Canada Border Services Agency removals officer must defer removal if proceeding with the removal would expose the person to "a risk of death, extreme sanction or inhumane treatment".[2] The complainant did not seek judicial review of the Canada Border Services Agency decision before the Federal Court either.

4.7 The State party stresses that a successful judicial review would result in an order for reconsideration of the impugned decision. The State party refers to the Committee's Views in several communications which show that judicial review in the State party is not a mere formality and may consider the substance of the case.[3] The State party addresses recent Views of the Committee in which it decided that judicial review in the State party did not and should not provide a review of the merits of decisions to expel individuals who faced a substantial risk of torture.[4] The State party does not accept that its domestic system of judicial review, in particular its Federal Court, fails to provide an effective remedy against removal where there are substantial grounds for believing that applicants face a serious risk. It submits that the current system does in fact provide for a judicial review on the merits when there are questions as to whether the decision maker acted within its jurisdiction; whether procedural fairness principles were complied with; whether a factual error was made; and whether the decision maker made a legal error.[5] In such cases, the Federal Court would necessarily review the applicant's claim of risk of torture if returned to his or her country of origin. If the Federal Court decides that there was an error of law or an unreasonable finding of fact, it will grant leave for judicial review and has the authority to set the decision aside and send it back for redetermination by a different decision maker, in accordance with such directions as the Court deems appropriate.[6] The Federal Court will not hesitate to intervene if it determines that the impugned decision has been erroneously made.[7] The State party further submits that its judicial review determinations, using the

[2] See *Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286 (CanLII), paras. 41–45 and 52; *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (CanLII); and *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 (CanLII).

[3] See *Aung v. Canada* (CAT/C/36/D/273/2005), para. 6.3; and *L.Z.B. and J.F.Z. v. Canada* (CAT/C/39/D/304/2006).

[4] See *Singh v. Canada* (CAT/C/46/D/319/2007), para. 8.8; and *W.G.D. v. Canada* (CAT/C/53/D/520/2012, para. 7.3).

[5] See Federal Courts Act, subsect. 18.1 (4).

[6] Ibid., subsect. 18.1 (3).

[7] See *Tabassum v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1185 (CanLII), paras. 39 and 43, in which the Court concluded that the pre-removal risk assessment officer had mischaracterized the evidence and erred in his finding that the applicant was not being threatened by her husband; *Babai v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1341 (CanLII), paras. 35 and 37, in which the Court concluded that the pre-removal risk assessment officer had failed to consider contradictory evidence and had made a reviewable error in finding that State protection was available to the applicant; *Abbasova v. Canada (Minister of Citizenship and Immigration)*, 2011

reasonableness standard, are consistent with the approach of the European Court of Human Rights, whereby judicial review using this standard satisfied the requirement to provide an effective remedy.[8] For these reasons, judicial review is a procedure that must be exhausted for the purposes of admissibility and the complainant has failed to provide any explanation as to why he failed to exhaust this remedy.

4.8 Should the Committee consider the communication admissible, the State party submits that it is wholly without merit. The complainant has not presented sufficient and credible evidence that he faces a foreseeable, real and personal risk of being subjected to torture by State officials or people acting in an official capacity, if returned to Pakistan.

4.9 The State party further submits that, according to the available evidence, State protection and a viable internal flight alternative may be available to him in Pakistan. Although the location of the alleged attack in April 2010 is unclear, the complainant appears to be claiming the risk, if any, would be from Lashkar-e-Taiba in and around his home town of Lahore.

4.10 The State party requests the Committee to lift the interim measures in respect of the complainant as he failed to establish that he would face irreparable harm if returned to Pakistan. His communication is incompatible with the Convention as the acts that were allegedly perpetrated against him in the past and would be perpetrated in the future were not carried out by State officials and thus do not constitute "torture" within the meaning of article 1 of the Convention. Furthermore, the State party's authorities have determined that State protection and an internal flight alternative would be available to him in Pakistan, which would allow him to live without serious risk of harm.

Complainant's comments on the State party's observations

5.1 Further to the Committee's request to substantiate the risk the complainant faced upon his return to Pakistan, on 3 November 2016, his counsel submitted that there were no blasphemy charges against the complainant in Pakistan and that "the police was just harassing his family that they would falsely take action against him for blasphemy". No further information in this connection was provided by the complainant, despite specific requests.

5.2 On 5 May 2017, the complainant commented on the State party's observations, requesting that the interim measures be maintained and for the Committee to consider the communication on the merits. He submits that if returned to Pakistan he would face a serious risk of death and torture at the hands of Sunni terrorists and extremists (Lashkar-e-Taiba), the police and his girlfriend's family; a serious risk of arrest and detention under false charges, such as blasphemy; and a serious risk of abduction, murder, beheading or stoning to death by Lashkar-e-Taiba. The complainant claims that he was assaulted, and his cousin was killed, by Lashkar-e-Taiba and that his family have received threats from them. He explains that the Government supports Sunni terrorist organizations, such as Lashkar-e-Taiba, and is involved in the killing and persecution of minorities. He did not receive any protection from the authorities in the past and no protection would be available to him in the future. The authorities are unwilling and unable to investigate or prosecute the perpetrators of attacks against religious minorities.

5.3 The complainant argues that there is no viable internal flight alternative for him in Pakistan as Sunni terrorists are spread all over the country and are looking for him.

FC 43 (CanLII), in which the Court found that the pre-removal risk assessment officer had failed to consider new psychological evidence; *Bors v. Canada (Citizenship and Immigration)*, 2010 FC 1004 (CanLII), paras. 56–58 and 73, in which the Court determined that the pre-removal risk assessment officer's selective review of the evidence had led to an unreasonable finding that the situation of the Roma people in Hungary had improved.

[8] See European Court of Human Rights, *Soering v. The United Kingdom* (application No. 14038/88), judgment of 7 July 1989; and *Vilvarajah and others v. The United Kingdom* (application Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87), judgment of 30 October 1991.

5.4 He further claims that the situation of minorities in Pakistan is deteriorating, with daily reports of killings of Shias by Lashkar-e-Taiba. The Canadian authorities have warned against all non-essential travel to Pakistan.

5.5 Therefore, the complainant claims that he has established prima facie that he was a victim of torture in the past and that he would face a substantial personal, real and present risk of torture in the future. He adds that the rejection of pertinent evidence by the Canadian authorities demonstrates a denial of justice.

5.6 The complainant stresses that he has exhausted all available domestic remedies. He chose not to pursue the remedies listed by the State party as they are expensive, ineffective and unlikely to bring effective relief, with very slim chance of success. Furthermore, these remedies have no suspensive effect on the removal. The State party has no effective recourse that would correct mistakes and prevent violations of international law.

5.7 Furthermore, the complainant married a Canadian permanent resident on 12 September 2016, who has sponsored him for permanent residence in Canada on 26 September 2016; however, the mere act of sponsorship cannot stay his removal, unless approved.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of those remedies has been unreasonably prolonged or is unlikely to bring effective relief.[9]

6.3 The Committee takes note of the State party's argument that the complaint should be declared inadmissible under article 22 (5) (b) of the Convention on the grounds that the complainant has failed to exhaust all available domestic remedies, as he failed to seek judicial review of the negative pre-removal risk assessment and Canada Border Services Agency decisions and as his application for permanent residence based on humanitarian and compassionate considerations was pending. The Committee also takes note of the State party's submission that the complainant failed to apply for a second pre-removal risk assessment, for which he has been eligible since 29 December 2016.

6.4 The Committee recalls its jurisprudence that a humanitarian and compassionate application is not an effective remedy for the purposes of admissibility pursuant to article 22 (5) (b) of the Convention, given its discretionary and non-judicial nature and the fact that it does not stay the removal of a complainant.[10] Accordingly, the Committee does not consider it necessary for the complainant to exhaust the application for permanent residence on the basis of humanitarian and compassionate grounds for the purpose of admissibility.[11]

6.5 Concerning the complainant's failure to apply for leave to seek judicial review of the pre-removal risk assessment and Canada Border Services Agency decisions, the Committee notes the State party's argument that judicial review in such cases assesses, inter alia, whether a factual or legal error has been made and that such review is effective and

[9] See, inter alia, *E.Y. v. Canada* (CAT/C/43/D/307/2006/Rev.1), para. 9.2. See also the Committee's general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, para. 34.

[10] See, e.g., communications *J.S. v. Canada* (CAT/C/62/D/695/2015), para. 6.3; *J.M. v. Canada* (CAT/C/60/D/699/2015), para. 6.2; *A v. Canada* (CAT/C/57/D/583/2014), para. 6.2; and *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 7.4.

[11] See, e.g., communication *S.S. v. Canada* (CAT/C/62/D/715/2015), para. 6.3.

substantive and that, in practice, cases are sent back for reconsideration on this basis.[12] The Committee further notes the complainant's assertion that he did not apply for judicial review of the impugned decisions as, in any case, such remedies are expensive, ineffective and unlikely to bring effective relief, and therefore the communication should be found to be admissible in accordance with article 22 (5) (b).

6.6 The Committee recalls its jurisprudence that judicial review in the State party is not a mere formality and that the Federal Court may, in appropriate cases, look at the substance of a case.[13] Mere doubt about the effectiveness of a remedy does not, in the Committee's view, dispense with the obligation to exhaust it. In the circumstances, the Committee concludes that the complainant has failed to advance sufficient elements to show that judicial review of the negative decisions of both the pre-removal risk assessment and the administrative deferral of removal would have been ineffective in this case and has not justified his failure to avail himself of these remedies.

6.7 Accordingly, the Committee is satisfied with the argument of the State party that, in this particular case, there were remedies, both available and effective, which the complainant has not exhausted.[14] In the light of this finding, the Committee does not deem it necessary to examine the State party's assertion that the communication is inadmissible as incompatible with the Convention or manifestly unfounded.

6.8 The Committee therefore decides:

(a) That the communication is inadmissible under article 22 (5) (b) of the Convention;

(b) That the present decision shall be communicated to the complainant and to the State party.

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[12] According to section 18.1 (4) of the Federal Courts Act, a judicial review of a pre-removal risk assessment decision by the Federal Court is not limited to errors of law and mere procedural flaws and the Court may look at the substance of a case.

[13] See, e.g., communication *Aung v. Canada*, para. 6.3.; *S.S. and P.S. v. Canada* (CAT/C/62/D/702/2015), para. 6.5.

[14] See, e.g. *J.S. v. Canada*, para. 6.6; and *S.S. and P.S. v. Canada*, para. 6.6.